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Supreme Court, U.S.
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No. 03-790

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IN THE

Supreme Court of the United States

SAFETY NATIONAL CASUALTY CORPORATION,

Petitioner,

v.

DOW CORNING CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court, in advancing the federal policy favoring binding arbitration under the Federal Arbitration Act, has held a court's role in an arbitration is limited to matters of "arbitrability," with all other questions reserved for the arbitrator, including "what *kind of arbitration proceeding the parties agreed to*." *Green Tree Fin. Corp. v. Bazzle*, __ U.S. __, 123 S. Ct. 2402, 2407 (2003) (emphasis in original). Once a court concludes the parties are subject to an agreement to arbitrate their dispute, the arbitrator decides all procedural questions that bear on its "final disposition." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002). In the Eighth Circuit, which held the arbitrators in this case were without authority to declare their decision to be binding, "arbitrability" is not a portal to arbitration, but rather a roadblock, and a gateway to litigation.

The questions presented are:

1. Is arbitration binding or a threshold to litigation? The Eighth Circuit held the later.

2. Does an arbitration panel or a court decide whether arbitration is binding? The Eighth Circuit held the later.

3. Are the findings of fact by an arbitration panel or a district court entitled to deference or may a federal court of appeals develop its own view of the facts? The Eighth Circuit held the later.

STATEMENT UNDER RULE 29.6

Petitioner Safety National Casualty Corporation and Respondent Dow Corning Corporation are the parties to this proceeding.

Petitioner Safety National Casualty Corporation states that Delphi Financial Group, a publicly held company, holds 100% of its stock.

TABLE OF CONTENTS

	Page
Questions Presented	i
Statement under Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	xi
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	2
Reasons for Granting the Petition	4
I. There Is No Such Thing As Non-Binding Arbitration.	4
II. The Eighth Circuit's Decision Conflicts With The Court's Most Recent Decision Addressing The Scope Of Arbitrator Authority, *Green Tree Fin. Corp. v. Bazzle.*	10

Contents

Page

A. "What Kind Of Arbitration Proceeding The Parties Agreed To" Is Not An Issue Of "Arbitrability." 12

B. The Question Whether Arbitrators Have The Authority To Decide "What Kind Of Arbitration Proceeding The Parties Agreed To" Presents An Important And Recurring Issue That Warrants The Court's Review Because The Issue Will Impact The Resolution Of Countless Important Disputes. 18

1. The Eighth Circuit's decision has far reaching consequences. 19

2. The language of Safety's arbitration clause appears in many national and international contract disputes. ... 21

III. The Eighth Circuit Has Created A Standard Of Review That Clashes With The Court's Dictates And Is At Cross-Purposes With The Federal Policy, Which Requires Any Doubts Concerning The Scope Of Arbitrable Issues To Be Resolved In Favor Of Arbitration. ... 24

Conclusion 30

TABLE OF CITED AUTHORITIES

Page

Cases:

Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265 (1995) 9, 19

AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643 (1986) 10, 16, 26

Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc., 935 F.2d 1501 (7th Cir. 1991) ... 6

Eisel v. Howell, 155 A.2d 509 (Md. 1959) 22

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995) 16, 17, 25, 29

Folkways Music Publishers, Inc. v. Weiss, 989 F.2d 108 (2d Cir. 1993) 27

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 9, 19

Green Tree Fin. Corp. v. Bazzle, __ U.S. __, 123 S. Ct. 2402 (2003) ..... *passim*

Green Tree Fin. Corp. v. Bazzle, 2003 WL 1989562, 71 USLW 3695, Oral Argument (Apr. 22, 2003) 14, 15

Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002) ..... *passim*

Cited Authorities

Page

John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964) 5, 11, 17, 28

Kelleher v. Cersosimo, 320 N.E.2d 840 (Mass. Ct. App. 1974) 22

Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995) 25

McIlroy v. PaineWebber, Inc., 989 F.2d 817 (5th Cir. 1993) 25

McKee v. Home Buyers Warranty Corp. II, 45 F.3d 981 (5th Cir. 1995) 6, 22

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 9, 19, 23

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) 10, 25

Oldroyd v. Elmira Savings Bank, FSB, 134 F.3d 72 (2d Cir. 1998) 21

Orlando v. Interstate Container Corp., 100 F.3d 296 (3d Cir. 1996) 12, 26

Pacificare Health Systems, Inc. v. Book, __ U.S. __, 123 S. Ct. 1531 (2003) 10, 17

Cited Authorities

Page

P & P Indus., Inc. v. Sutter Corp., 179 F.3d 861 (10th Cir. 1999) 6

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) 21

Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela, 991 F.2d 42 (2d Cir. 1993) 21

Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996) 19

Rainwater v. National Home Ins. Co., 944 F.2d 190 (4th Cir. 1991) 6, 22, 29

Ringwelski v. Pederson, 919 P.2d 957 (Colo. Ct. App. 1996) 22

Schaefer v. Allstate Ins. Co., 590 N.E.2d 1242 (Ohio 1992) 8

Scott v. Avery, 5 H L.Cas. 811 (1856) 22

Shook & Fletcher Asbestos Settlement Trust v. Safety Nat'l Cas. Corp., No. 03-1092, 2003 WL 22391526 (8th Cir. Oct. 21, 2003) 5, 9, 13, 21

United Paperworkers Intern'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29 (1987) 20, 25-26

Cited Authorities

Page

United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944) 8

United Steel Workers of America v. American Mfg. Co., 363 U.S. 564 (1960) 11, 16

Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Jr. Univ., 489 U.S. 468 (1989) 24

Wabash Ry. Co. v. American Refrigerator Transit Co., 7 F.2d 335 (8th Cir. 1925) 5

Statutes and Rules:

9 U.S.C. §§ 1-16 2

9 U.S.C. § 2 2

9 U.S.C. § 10 ..... 3, 27

28 U.S.C. § 1254 1

28 U.S.C. § 1332 3

H.R. REP. No. 97-542, 97th Cong., 2d Sess. (1982), *reprinted in* 1982 U.S.C.C.A.N. 765 ..... 9, 19

Rules:

S. CT. R. 10(a) 29

Page

Other Authorities:

AMERICAN ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES (July 1, 2003) 21

AMERICAN ARBITRATION ASS'N, INSURANCE ADR MANUAL (1993) 8

JOHN ALAN APPLEMAN, ET AL., INSURANCE LAW AND PRACTICE (West 1972) 7, 23

BLACK'S LAW DICTIONARY (7th ed. 1999) 6

Comment, *Judicial Deference to Arbitral Determinations: Continuing Problems of Power and Finality*, 23 UCLA L. REV. 936 (1976) 7

MARTIN DOMKE, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION (1968) 7

BRYAN A. GARNER, DICTIONARY OF MODERN LEGAL USAGE (2d ed. 1995) 6

ERIC M. HOLMES, ET AL., HOLMES' APPLEMAN ON INSURANCE 2D (LEXIS 1999) 21, 22, 23

ROBERT E. KEETON, ET AL., INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES (1988) 8

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Page

RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS BY SAMUEL WILLISTON (4th ed. 2001) 7

JOHN E. MURRAY, JR., CORBIN ON CONTRACTS (Matthew Bender 2001) 22

THOMAS H. OEHMKE, COMMERCIAL ARBITRATION (1987) 7

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Eighth Circuit Filed July 9, 2003 ..... 1a

Appendix B — Memorandum And Order Of The United States District Court For The Eastern District Of Missouri, Eastern Division Dated March 18, 2002 ..... 20a

Appendix C — Arbitration Decisions 86a

Appendix D — Consent Order Of The United States Bankruptcy Court For The Eastern District Of Michigan, Northern Division Filed July 15, 1999 ..... 91a

Appendix E — Order Of The United States Court Of Appeals For The Eighth Circuit Denying Petition For Rehearing Dated August 28, 2003 ..... 96a

Appendix F — Opinion Of The United States Court Of Appeals For The Eighth Circuit In *Shook & Fletcher Asbestos Settlement Trust v. Safety National Casualty Corporation* Filed October 21, 2003 ..... 97a

PETITION FOR A WRIT OF CERTIORARI

Petitioner Safety National Casualty Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case in order to preserve arbitration as an alternative to litigation and to resolve the conflict between the Eighth Circuit's opinion and the Court's decision in *Green Tree Fin. Corp. v. Bazzle*, __ U.S. __, 123 S. Ct. 2402 (2003), amongst other important issues.

OPINIONS BELOW

The district court's memorandum and order (per Hamilton, D.J.) denying Respondent Dow Corning Corporation's motion to vacate the arbitration decision is unpublished and appears at Pet. App. 20a-85a. The opinion of the United States Court of Appeals for the Eighth Circuit (per Loken, C.J., joined by Fagg, and Arnold, JJ.) is reported at 335 F.3d 742 (8th Cir. 2003). Pet. App. 1a-19a. The Eighth Circuit's order denying rehearing and rehearing *en banc* is not otherwise published. Pet. App. 96a.

STATEMENT OF JURISDICTION

The Eighth Circuit's judgment was entered on July 9, 2003. Pet. App. 1a. The Eighth Circuit entered an order denying a timely petition for rehearing and rehearing *en banc* on August 28, 2003. Pet. App. 96a.

Petitioner invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, mandates the enforcement of the terms of arbitration agreements contained in contracts evidencing transactions in interstate commerce. Under section 2 of the FAA, arbitration agreements shall be "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

STATEMENT OF THE CASE

Insurance policies commonly have arbitration provisions; Safety's policies do.

Safety issued three excess umbrella insurance policies to Dow Corning Corporation for the period December 1, 1983, to December 1, 1984. Pet. App. 2a. The policies, which afforded coverage of $9.15 million, included a mandatory arbitration provision, which provided:

> As a condition precedent to any right of action under this Policy, any dispute arising out of this Policy shall be submitted to a board of arbitration. . . .

Pet. App. 4a-5a. The provision specified that the "members of the board shall be active or retired, disinterested officials of insurance or reinsurance companies," and required the board to "make its decision with regard to the custom and usage of the insurance and reinsurance business." *Id.* 5a.

Dow Corning sought coverage under Safety's policies for breast implant claims. In 1998, Dow Corning and Safety submitted their dispute to arbitration.

Per the parties' agreement, the three-member panel of arbitrators was comprised of one member selected by Dow Corning, one member selected by Safety, and an umpire. Pet. App. 21a. After a four-day hearing, the arbitrators issued their decision. *Id.* 86a-90a. They unanimously declared their decision to be binding on both parties. *Id.* 86a, 89a. They also unanimously ruled for Dow Corning and against Safety on Safety's defenses based on late notice and material misrepresentation. *Id.* 88a, 89a. Finally, in a two-one decision, they ruled for Safety and against Dow Corning on certain coverage issues. *Id.* 86a-87a, 89a.

Following the arbitrators' decision, Dow Corning filed a motion to vacate in the United States District Court for the Eastern District of Missouri. The district court, which had jurisdiction under 28 U.S.C. § 1332 and 9 U.S.C. § 10(a), denied Dow Corning's motion. Pet. App. 20a-21a.

Dow Corning appealed to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit concluded the parties had agreed to mandatory, but non-binding arbitration. Pet. App. 6a. In modifying the district court's judgment that the parties had agreed to binding arbitration, the Eighth Circuit found the arbitrators had "doubtlessly exceeded their authority in declaring their decision to be binding, because that issue goes to the scope of their authority." *Id.* 8a.

This petition for a writ of certiorari followed after the Eighth Circuit denied Safety's timely filed petition for rehearing and rehearing *en banc*.

REASONS FOR GRANTING THE PETITION

I. There Is No Such Thing As Non-Binding Arbitration.

The question presented is one of great importance to all parties to arbitration agreements and in particular to the insurance industry which resolves by binding arbitration billions of dollars of disputes quietly, efficiently, and without enormous expense. The Eighth Circuit's opinion will be precedent for all "losers" to contend that arbitration is a prelude to litigation. From the Eighth Circuit's decision, challenges to the binding nature of arbitration will be *de rigueur*. This seed should not be allowed to germinate.

The Eighth Circuit found Dow Corning and Safety were parties to a valid arbitration agreement that called for mandatory arbitration of their insurance coverage dispute. Pet. App. 6a. The Eighth Circuit acknowledged the "federal policy favors arbitration, and that [the policy] normally means binding arbitration." *Id.* However, in concluding the arbitrators' decision was not binding, the Eighth Circuit ignored the federal policy, its own precedent, the decisions of other circuit courts of appeal, and the universally accepted understanding that arbitration provides for the final and binding resolution of disputes. Without citation to any authority, the Eighth Circuit held the federal policy has no application to disputes involving insurance. *Id.*

The Court should grant certiorari to decide once and for all whether there is non-binding arbitration under the FAA. The Court should make uniform the rule and declare all arbitrations under the FAA binding once a court resolves the "gateway" question of arbitrability in favor of arbitration based on the existence of a valid and applicable agreement to arbitrate.

A declaration of a uniform presumption for binding arbitration is necessary to protect the federal policy from encroachments upon arbitrator authority by the courts. The Eighth Circuit's decision will thwart the arbitration of disputes and encourage litigation. There is no economic incentive to participate in an arbitration proceeding that would be no more than advisory.

A uniform presumption in favor of binding arbitration is consistent with the Court's precedent. The Court has repeatedly declared that once a court finds there is an enforceable agreement to arbitrate, the court has no further role, and all other questions are for the arbitrator to decide, including procedural issues that bear on the dispute's "final disposition." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964).

Consistent with the Court's decisions, the Eighth, Fourth, Fifth, Seventh, and Tenth Circuits have held the federal policy contemplates *binding* arbitration. The Eighth Circuit, contrary to its decision in this case, has held a valid arbitration award "carrie[s] with it *an implied agreement to be bound*." *Wabash Ry. Co. v. American Refrigerator Transit Co.*, 7 F.2d 335, 351 (8th Cir. 1925) (emphasis added).[1] The Fourth Circuit has held there is a judicial "presumption that one

1. The seed planted by the Eighth Circuit has already sprouted. Citing its decision in this case, the Eighth Circuit in *Shook & Fletcher Asbestos Settlement Trust v. Safety Nat'l Cas. Corp.*, No. 03-1092, 2003 WL 22391526 (8th Cir. Oct. 21, 2003), again held that arbitrators had no authority to declare their decision to be binding. The Eighth Circuit's *Shook & Fletcher* opinion appears at Pet. App. 97a-99a. On November 24, 2003, the Eighth Circuit denied rehearing and rehearing *en banc* in the case.

submits to arbitration, as opposed to mediation, precisely *because of* the binding quality of the process." *Rainwater v. National Home Ins. Co.*, 944 F.2d 190, 192 (4th Cir. 1991) (emphasis in original). The Fifth Circuit has observed the federal policy favoring arbitration "encompasses an expectation that such procedures will be binding." *McKee v. Home Buyers Warranty Corp. II*, 45 F.3d 981, 985 (5th Cir. 1995). The Seventh Circuit has held an arbitration agreement is "a contractual commitment to abide by the arbitrator's interpretation." *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991). The Tenth Circuit presumes an arbitration is intended by the parties to be the exclusive means of resolving their disputes under a contract. *P & P Indus., Inc. v. Sutter Corp.*, 179 F.3d 861, 866 (10th Cir. 1999).

The federal policy for binding arbitration comports with the term's common and ordinary meaning. Non-binding arbitration is an oxymoron. BLACK'S LAW DICTIONARY defines "arbitration" as "[a] method of dispute resolution involving one or more neutral third parties who are usu. agreed to by the disputing parties and whose decision is binding. – Also termed (redundantly) *binding arbitration*." BLACK'S LAW DICTIONARY 100 (7th ed. 1999) (emphasis in original). *See also* BRYAN A. GARNER, DICTIONARY OF MODERN LEGAL USAGE 73 (2d ed. 1995) ("The results of arbitration are binding – that is, the parties to the arbitrator's decision are bound by it.")

There is an expectation in the marketplace that arbitration brings finality to disputes.

> *Every [arbitration] award rendered in compliance with all legal requirements is a complete and*

> *binding determination of a controversy* and may not be disturbed except on equitable or statutory grounds. . . . *The award is conclusive on all matters submitted to the arbitrators. When the parties choose to adjust their disputes through the arbitral process, the award is final* and, under such an agreement, neither party can hope again to litigate the same points successfully.

21 RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS BY SAMUEL WILLISTON, § 57:115 at 587 (4th ed. 2001) (footnotes omitted) (emphasis added).

"The object of arbitration is to achieve a *final disposition* of the differences between the parties in an easier, more expeditious, and less expensive manner than by litigation." 20 JOHN ALAN APPLEMAN, ET AL., INSURANCE LAW AND PRACTICE, § 11431 at 592 (West 1972) (emphasis added). Unlike mediation, "the essence of the arbitration process is that an arbitral award shall put the dispute to rest." Comment, *Judicial Deference to Arbitral Determinations: Continuing Problems of Power and Finality*, 23 UCLA L. REV. 936, 948-49 (1976). Even in the absence of an express agreement making the arbitration final and binding, "conclusiveness is expected." *Id.*

The very meaning of the term "arbitration" connotes a final and binding award. MARTIN DOMKE, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION, § 1.01 at 1 (1968). Arbitration's defining characteristic is a final and binding disposition of a controversy or dispute. THOMAS H. OEHMKE, COMMERCIAL ARBITRATION, § 2.1 at 15 (1987). As noted by the Ohio Supreme Court:

> "Binding arbitration" is a redundancy. "Nonbinding arbitration" is a contradiction in terms. For a dispute

> resolution to be classified as "arbitration," the decision rendered must be final, binding and without qualification or condition as to the finality of an award whether or not agreed to by the parties.

Schaefer v. Allstate Ins. Co., 590 N.E.2d 1242, 1245 (Ohio 1992).

The expectation in the insurance context is no different. Insurance is a business in interstate commerce. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 539 (1944). Therefore, an agreement to arbitrate an insurance dispute is no less subject to the federal policy under the FAA for binding arbitration than any other contract.

Insurance custom and usage demonstrate insurance-related arbitrations are meant to be binding.

> Arbitration clauses are common in insurance contracts. They have been included in insurance policies for many years. . . . In most cases, private agreements to arbitrate involve binding arbitration. The parties seek to avoid costly, time-consuming litigation by agreeing to submit all disputes for binding decision by an arbitrator or panel of arbitrators.

AMERICAN ARBITRATION ASS'N, INSURANCE ADR MANUAL, § 4.03 at 57 (1993). "Parties generally appreciate the advantage of arbitral finality and recognize that appeals will delay the ultimate resolution of the dispute." *Id.* at § 6.25 at 122. "In general, a very high degree of finality is accorded to most arbitration decisions." ROBERT E. KEETON, ET AL., INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES, at 1091 (1988).

Further, in this case and *Shook & Fletcher Asbestos Settlement Trust v. Safety Nat'l Cas. Corp.*, which involved an identical arbitration clause, two separate arbitration panels – six different arbitrators in all – following "the custom and usage of the insurance and reinsurance business," unanimously concluded their decisions were binding. Pet. App. 5a, 98a.

The FAA permits private parties to "'trade[] the procedures . . . of the courtroom for the simplicity, informality, and expedition of arbitration,'" which is usually cheaper and faster than litigation. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)); *see also Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 280 (1995) (citing H.R. REP. No. 97-542, 97th Cong., 2d Sess. 13 (1982), *reprinted in* 1982 U.S.C.C.A.N. 765, 777). There is no trade, and the federal policy is emasculated, when a reviewing court ignores the arbitrators' findings and sends the parties to litigation after they have devoted significant time and resources to arbitration.

Dow Corning and Safety have been involved in this insurance coverage dispute since 1993. They have been in arbitration for five years. They have spent collectively hundreds of thousands of dollars to resolve their differences. They have litigated in Michigan state court. They have been to the district court three times and the Eighth Circuit twice. Although they agreed to arbitrate *all* disputes arising out of the policies, their arbitration has become nothing more than a precondition – an expensive "dry run" – to what will likely be protracted and costly litigation.

Absent review by the Court, Dow Corning and Safety, as well as similarly situated parties, in both the insurance and non-insurance context, will be faced with the empty gesture of non-binding arbitration as a prelude to litigation, a consequence that defeats the very object of the liberal federal policy behind the FAA. As the Eighth Circuit's decision undermines the federal policy favoring binding arbitration, certiorari should issue so the Court may declare a uniform presumption for binding arbitration in every arbitration agreement subject to the FAA.

II. The Eighth Circuit's Decision Conflicts With The Court's Most Recent Decision Addressing The Scope Of Arbitrator Authority, *Green Tree Fin. Corp. v. Bazzle.*

One consistent theme emerges from the Court's arbitration decisions: the jealous protection of the federal policy favoring the resolution of disputes by binding arbitration. "The [FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

In advancing this policy, the Court has limited the role of the courts to "gateway" questions of arbitrability. *Pacificare Health Systems, Inc. v. Book*, __ U.S. __, 123 S. Ct. 1531, 1536 n.2 (2003); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002). "Arbitrability" concerns the very narrow issue whether an agreement creates a duty for the parties to arbitrate a particular dispute. *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986). Where, as here, the parties have agreed to submit "any dispute" arising out of their agreement to arbitration, the court's function is "confined"

to the "very limited" role of ascertaining whether the claim is subject to the contract. *United Steel Workers of America v. American Mfg. Co.*, 363 U.S. 564, 567-68 (1960).

Once the court concludes the dispute is arbitrable, all other questions are for the arbitrator to resolve, including procedural questions that grow out of the dispute and which affect its "*final disposition.*" *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964) (emphasis added). Once a court finds the parties have agreed to arbitrate their dispute, "the court will have exhausted its function, except to order the reluctant party to arbitration." *United Steel Workers of America v. American Mfg. Co.*, 363 U.S. 564, 571 (Brennan, J., concurring).

The Eighth Circuit's decision conflicts with these precepts of arbitration jurisprudence. In opposition to the Court's repeated decisions limiting the courts' role to the "gateway" issue of arbitrability, the Eighth Circuit has authorized the courts to decide matters of contract interpretation and arbitration procedure, including the power to decide what kind of arbitration the parties have agreed to, under the guise that these issues go to the scope of arbitrator authority. Certiorari is necessary to preserve the last twenty years of arbitration jurisprudence which promotes the federal policy for binding arbitration by reserving for arbitrators all issues, except for the narrow question whether the parties have agreed to arbitrate their dispute.

A. "What Kind Of Arbitration Proceeding The Parties Agreed To" Is Not An Issue Of "Arbitrability."

The Court's pronouncement that arbitrability is an issue for the courts has been heard and understood by the judiciary. However, the Court's mandate limiting "arbitrability" questions to "gateway" issues has not been heeded. This case presents the opportunity for the Court to quell once and for all expansive interpretations of arbitrability that conflict with the Court's precedent and undermine the federal policy for binding arbitration.

The Eighth Circuit, in this case and *Shook & Fletcher Asbestos Settlement Trust v. Safety Nat'l Cas. Corp.*, No. 03-1092, 2003 WL 22391526 (8th Cir. Oct. 21, 2003), held the issue whether the parties contracted for binding or non-binding arbitration went to the scope of the arbitrators' authority and was therefore beyond their authority to resolve. Pet. App. 8a; *Shook & Fletcher*, 2003 WL 22391526 *1; Pet. App. 98a-99a. Similarly, the Third Circuit has held that "because the court must determine the duty to arbitrate from an interpretation of the collective bargaining agreement, it also has the task of determining the dispositive effect to be given to an award – again, by construing the contract." *Orlando v. Interstate Container Corp.*, 100 F.3d 296, 300 (3d Cir. 1996). These decisions misinterpret the term "arbitrability" and usurp for the courts questions that are the exclusive province of arbitrators.

These decisions by the Eighth and Third Circuits conflict with the Court's most recent arbitration decision, *Green Tree Fin. Corp. v. Bazzle*, __ U.S. __, 123 S. Ct. 2402 (2003), which was decided two weeks before the Eighth Circuit's decision in this case. However, the Eighth Circuit, in this

case and *Shook & Fletcher*, did not address the Court's decision in *Green Tree*, which removes all doubt that the arbitrators acted within their authority in deciding what type of arbitration the parties had agreed to, including whether the proceeding was binding or not.

In *Green Tree*, the Court addressed the judiciary's limited role in arbitrations when it considered the interplay between class actions and arbitrations. The parties' agreement, a broad-form arbitration clause, provided for the arbitration of "'[a]ll disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract.'" 123 S. Ct. at 2407. In vacating the lower court's decision, the Court held that although the contract did not mention class actions by name, it was for the arbitrator, rather than for the court, to decide whether the contract contemplated class action arbitration. *Id.* The Court concluded the dispute over class action arbitration did not come within the "limited circumstances" where courts assume the parties intended a court, and not an arbitrator, to decide a particular arbitration matter. *Id.* The Court held this "narrow exception" did not apply to the parties' dispute because their conflict did not concern the arbitration clause's validity or its application to the dispute. *Id.*

The Court distinguished between questions of arbitrability, which are for the courts to decide, and questions of substance and procedure, which are for the arbitrators to decide. The Court held the parties' dispute – whether the contract permitted class action arbitration – went to "what *kind of arbitration proceeding* the parties agreed to." *Id.* (emphasis in original). Thus, as the question concerned "contract interpretation and arbitration procedures," the

Court held the issue was one for the arbitrators to decide. *Id.* The Court explained:

> Arbitrators are well situated to answer that question. Given these considerations, along with the arbitration contracts' sweeping language concerning the scope of questions committed to arbitration, this matter of contract interpretation should be for the arbitrator, not the courts, to decide.

Id.

The oral argument transcript from *Green Tree* demonstrates it was the Court, not the parties, which steered resolution of the dispute into the arbitrators' domain. Justice Breyer asked: "Well, . . . if it's disputable, why shouldn't the arbitrator decide that?" *Green Tree Fin. Corp. v. Bazzle*, 2003 WL 1989562, Oral Argument at 19 (Apr. 22, 2003). Green Tree's counsel took the position that the question (whether the arbitration clause covered class actions) went to the core of the arbitrator's authority and thus should not be decided by the arbitrator. Justice Breyer disagreed:

> No, but wait. There is a case, including one I just wrote, I think, for the Court which makes very clear that what you send to the arbitrator – I mean, there are dozens of cases where you have a phrase in a contract, and that's in dispute, and the parties have agreed we send disputes about the meaning of the contract to arbitration, you send that to the arbitrator.

> I mean, the only things that you don't are whether there's the arbitration contract is itself valid, et cetera. . . .
>
> What I have in front of me is a contract. It says, in this phrase, disputes will be arbitrated, there is a question, what does that mean, that word arbitration in this contract, and then I know that the parties have agreed to arbitrate the meaning of the dispute, all right – of any phrase – including that one.

Id. at 20-22.

The Court's *Green Tree* decision compels only one conclusion in this case. The arbitrators acted within their authority when they decided the parties' contracts called for binding arbitration. This question did not concern a "gateway" matter of arbitrability. The validity of the arbitration clause or its application to the dispute was not at issue. Indeed, the Eighth Circuit found the clause required mandatory arbitration of the parties' controversy. Pet. App. 6a.

The parties' agreement provided that "any dispute arising out of this Policy" would be arbitrated. Pet. App. 4a-5a. There was a question between the parties about whether the word "arbitration" meant a binding or non-binding result. That is a question of "what *kind of arbitration proceeding* the parties agreed to." *Green Tree Fin. Corp.*, 123 S. Ct. at 2407 (emphasis in original). Thus, the issue was properly decided by the arbitrators. Indeed, the issue preserved for the arbitrators in *Green Tree* (whether the arbitrators had the power to hear a class action) is closer to a question of

"the scope of their authority" than the issue whether Safety and Dow Corning had agreed to final and binding arbitration. The arbitrators here did not decide the scope of their authority; they decided whether Safety and Dow Corning had agreed that they would next go to court to argue about the arbitration award itself or to argue about the coverage issues on the merits.

The Eighth Circuit overstepped its bounds, in violation of the Court's directions, by deciding the binding/non-binding issue itself. The very words used by the Eighth Circuit betray that the court was treading where it should not go. Addressing the "condition precedent" language, the Eighth Circuit wrote: "Though the clause suggests that arbitration of a policy dispute will be followed by litigation, and thus is non-binding, like the district court *we do not find this textual clue conclusive*. It can also be read as simply recognizing that even binding litigation is often followed by litigation." Pet. App. 5a (emphasis added). The Eighth Circuit took it upon itself to "determine whether the parties to these 1983 excess liability insurance policies intended to contract for binding arbitration." *Id.* In so doing, the court openly engaged in contract interpretation. However, that task is reserved for arbitrators. *Green Tree Fin. Corp.*, 123 S. Ct. at 2407. Once a court finds the parties have agreed to arbitrate their dispute, questions of contract interpretation are for the arbitrator to decide. *American Steel Workers*, 363 U.S. at 567-68; *AT & T Technologies, Inc.*, 475 U.S. at 651.

The Eighth Circuit's reliance on the Court's decision in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), in support of its conclusion that the arbitrators were without authority to declare their decision to be binding is misplaced and confuses the nature of an arbitrability

determination. Pet. App. 8a. In *First Options*, a case where there was a question whether an arbitration agreement existed, the Court held only that courts have "primary authority to decide whether a party has agreed to arbitrate." 514 U.S. at 942.

Any doubt about the narrowness of the Court's decision in *First Options* was dispelled by the Court's subsequent decisions in *Pacificare Health Systems, Inc. v. Book*, __ U.S. __, 123 S. Ct. 1531 (2003), and *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002). In both cases, the Court held "the phrase 'question of arbitrability' has a . . . limited scope" and applies to "gateway" issues only. *Pacificare Health Systems, Inc.*, 123 S. Ct. at 1536 n.2; *Howsam*, 537 U.S. at 83-84. In *Howsam*, the Court ruled that a dispute over the limitation period for bringing an arbitration was for the arbitrator, and not the court, to decide. *Id.* at 85. The Court explained the application of the time limit at issue was not a "gateway" question of arbitrability. *Id.*

Here, there were no issues of arbitrability. The Eighth Circuit found the parties were subject to a valid arbitration agreement that called for mandatory arbitration of all disputes arising out of the insurance policies. Pet. App. 6a. Therefore, the Eighth Circuit's decision conflicts with *Howsam*, which held that all procedural questions affecting a dispute's final disposition are "presumptively" for the arbitrator to decide. 537 U.S. at 84. For "[o]nce it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its *final disposition* should be left to the arbitrator." *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964) (emphasis added).

For these reasons, the Eighth Circuit's decision calls forth the need for the Court's plenary review. The Eighth Circuit's decision conflicts with the Court's leading arbitration decisions by usurping the arbitrators' authority to decide matters of contract interpretation and arbitration procedure and granting to itself the power to decide what the parties intended when they entered into their contracts. As the Eighth Circuit's decision is in direct conflict with this Court's dictates concerning the limited the scope of "arbitrability" questions, certiorari should issue.

B. The Question Whether Arbitrators Have The Authority To Decide "What Kind Of Arbitration Proceeding The Parties Agreed To" Presents An Important And Recurring Issue That Warrants The Court's Review Because The Issue Will Impact The Resolution Of Countless Important Disputes.

In two ways, this case has future and practical significance and warrants the Court's review. Rather than confining the courts' role in arbitrations to "gateway" questions of "arbitrability," the Eighth Circuit's decision makes arbitration nothing more than a prelude to litigation and calls into question the efficacy of common-place, broad-form arbitration clauses, which are typical in many types of commercial agreements, including insurance policies and reinsurance treaties.

1. The Eighth Circuit's decision has far reaching consequences.

The Eighth Circuit's opinion that it, rather than the arbitrators, has the authority to decide what the parties meant by their contractual agreement to arbitrate has far-reaching consequences. The immediate violence done by the Eighth Circuit's decision is that it has ruled that an appellate court, rather than a panel of arbitrators, is the entity that should decide the parties' intentions. The big-picture result of that conclusion is that arbitration loses its position as an effective dispute resolution mechanism.

The Eighth Circuit's decision is especially injurious to parties to insurance contracts and reinsurance treaties. With no citation to authority and no factual support, the Eighth Circuit's ruling excepts insurance coverage disputes from the federal policy favoring binding arbitration and, thus, destroys the most pervasive form of insurance arbitration clause.

There is a "substantial federal concern for the enforcement of arbitration agreements." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728-29 (1996) (citation omitted). The federal policy's object is to achieve a final disposition of the parties' differences by trading the procedures of the courtroom for the simplicity, informality, and expedition of arbitration, which is a less expensive and faster means of dispute resolution. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)); *see also Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 280 (1995) (citing H.R. REP. No. 97-542, at 13 (1982)). By taking an issue away from arbitrators and giving it to the courts, the Eighth Circuit has made arbitration harder, less expeditious, and more expensive. While this Court

has been restricting the role of the courts in arbitration cases, the Eighth Circuit and the Third Circuit are expanding it.

The federal courts are unaccustomed to not exercising their authority. Left unchecked, they return to character. The decisions of the Eighth and Third Circuits evidence this weakness. Other courts will follow their example because they cannot help themselves. That is without supervision.

Every day, arbitrators resolve conflicts and tension between contractual terms. They apply their particular field's expertise and experience in doing so. The Eighth Circuit's decision threatens to open the door to courts cherry-picking discrete issues among parties and to limit the ability of arbitrators to resolve them. By denigrating the authority of arbitrators, the Eighth Circuit's decision can only promote the role of the courts in deciding to confirm or vacate arbitration awards on the basis of the court's view of the merits of the disputes. That is not a result intended by the FAA or this Court's arbitration precedent. A reviewing court must affirm an arbitration award even if the court is convinced the arbitrators have "committed serious error." *United Paperworkers Intern'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987). Therefore, certiorari should issue.

2. The language of the Safety arbitration clause appears in many national and international contract disputes.

The cases before the Eighth Circuit will not be the last to present issues concerning the scope of arbitrator authority. The type of arbitration clause in Safety's policies will be before the courts in the future. The Eighth Circuit has twice addressed the language in Safety's policies, in this case and in *Shook & Fletcher Asbestos Settlement Trust v. Safety Nat'l Cas. Corp.*, No. 03-1092, 2003 WL 22391526 (8th Cir. Oct. 21, 2003).

Safety's arbitration provision in the policies issued to Dow Corning and to Shook & Fletcher is a typical, broad-form arbitration clause. Indeed, as the clause provides for the arbitration of "any dispute arising out of this Policy" (Pet. App. 4a-5a), it is the "paradigm" of a broad-form clause. *See Oldroyd v. Elmira Savings Bank, FSB*, 134 F.3d 72, 76 (2d Cir. 1998); *see also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967); *Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela*, 991 F.2d 42, 48 n.9 (2d Cir. 1993). The clause conforms to the American Arbitration Association's recommended broad-form arbitration clause for commercial disputes. AMERICAN ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES 2 (July 1, 2003) ("any controversy or claim arising out of or relating to this contract"); 14 ERIC MILLS HOLMES, ET AL., HOLMES' APPLEMAN ON INSURANCE 2D, § 107.2 at 546 (LEXIS 1999). As observed by the Eighth Circuit, the clause is also a typical provision in reinsurance treaties. Pet. App. 6a.

The clause's "condition precedent" language is no less pervasive. The Eighth Circuit concluded, contrary to the arbitrators' decision, that the "condition precedent" language in Safety's clause means the parties bargained for non-binding arbitration. This language is very common in the insurance and reinsurance arenas. Reinsurance is a predominantly international industry.

The "condition precedent" language appears in numerous reported cases. *See McKee v. Home Buyers Warranty Corp. II*, 45 F.2d 981, 985-86 (5th Cir. 1995) (home warranty); *Rainwater v. National Home Ins. Co.*, 944 F.2d 190, 194 (4th Cir. 1991) (home warranty); *Ringwelski v. Pederson*, 919 P.2d 957, 959 (Colo. Ct. App. 1996) (construction contract); *Kelleher v. Cersosimo*, 320 N.E.2d 840, 841 (Mass. Ct. App. 1974) (construction contract); and *Eisel v. Howell*, 155 A.2d 509, 512 (Md. 1959) (construction contract). This is so because the language traces its lineage back to "at least the early 1800's, when arbitration clauses were commonly used in English marine reinsurance contracts." 14 ERIC MILLS HOLMES, ET AL., HOLMES' APPLEMAN ON INSURANCE 2D, § 107.2 at 544 (LEXIS 1999).

At the time, the common law was hostile to arbitration. Using arbitration as a "condition precedent" would not oust the court of jurisdiction and thus would allow an arbitration to go forward; subsequent litigation would not address the merits of the dispute but would serve to transform the arbitration award into a judgment and provide for collection. "In a leading English case, this devise was successful." 15 JOHN E. MURRAY, JR., CORBIN ON CONTRACTS, § 1435 at 353 n.94 (Matthew Bender 2001), *citing Scott v. Avery*, 5 H L. Cas. 811 (1856). Thus, where an insurance policy, by its terms, "makes arbitration a condition precedent to any

right of action, a suit can only be maintained to recover the amount of the award, or if it is invalid, the insured must allege and prove another arbitration, or some sufficient reason why it has become unnecessary or impossible." 6 JOHN ALAN APPLEMAN, ET AL., INSURANCE LAW AND PRACTICE, § 3922 at 520 (West 1972) (citation omitted).

To this day, insurance treatises define an arbitration clause as "[a] provision found in many reinsurance contracts whereby the parties agree to submit their disputes to an unofficial tribunal of their own choosing rather than a court of law, . . . , which produces an opinion *ultimately enforceable by a court of law.*" 14 ERIC MILLS HOLMES, HOLMES' APPLEMAN ON INSURANCE 2D, § 102.6 at 57 (LEXIS 1999) (emphasis added). As shown above, there is an expectation, consistent with the federal policy, that arbitration brings a final and binding resolution to a dispute.

This case presents a perfect example of how important the finality of arbitration is. Dow Corning is one of many corporations that has found itself at the center of a mass tort. Mass tort litigation is a major factor in today's economy. The defendants in mass tort cases turn to their insurers. Their insurers then turn to their reinsurers, which may be United States or, more often, international companies. "The arbitrability of disputes may be particularly important for the reinsurance industry because of its international scope." 14 ERIC MILLS HOLMES, HOLMES' APPLEMAN ON INSURANCE 2D, § 107.2 at 545 (LEXIS 1999); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (policy for arbitration applies with special force in international commerce). Most of those reinsurance agreements have arbitration clauses, and many provide that arbitration is a "condition precedent" to

litigation. Because of the Eighth Circuit's decision, parties must now question whether they can count on an efficient, expeditious dispute resolution procedure.

The Eighth Circuit's decision conflicts with the FAA's goal of overcoming judicial hostility to arbitration and undermines the liberal federal policy favoring binding arbitration. *See Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989). As the opinion will have far-reaching effects, certiorari should issue.

III. The Eighth Circuit Has Created A Standard Of Review That Clashes With The Court's Dictates And Is At Cross-Purposes With The Federal Policy, Which Requires Any Doubts Concerning The Scope Of Arbitrable Issues To Be Resolved In Favor Of Arbitration.

The Eighth Circuit's decision subjected the parties' agreement to arbitrate to the same judicial hostility that the FAA was designed to combat when it was enacted more than seventy-five years ago.

The district court found that "the parties agreed to binding arbitration on the issue of whether the policies provided coverage for the breast implant litigation" and thus the issue whether the panel exceeded its powers in so deciding was "moot." Pet. App. 45a-46a. The district's court's finding of fact was supported by a 1999 bankruptcy court consent order entered in Dow Corning's Chapter 11 bankruptcy. *Id.* In the consent order, which was made while this arbitration was in process, Dow Corning and Safety agreed that their arbitration would be final and binding. *Id.* 91a-95a. The order provided that Safety's alleged liability under the policies

"*will be fully and finally adjudicated*" in the parties' arbitration. *Id.* 92a (emphasis added).

However, in finding the parties intended non-binding arbitration, the Eighth Circuit ignored the governing standard of review and substituted its view of the facts for the district court's on the issue of the parties' intent. A reviewing court reviews a district court's judgment on a motion to vacate, modify, or confirm an arbitration award under familiar standards, accepting findings of fact that are not "clearly erroneous" and deciding questions of law *de novo*. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947-48 (1995). This standard of review does not leave the reviewing court "'free to correct the arbitration award' . . . ; rather, it is intended to reinforce the strong deference due an arbitrative tribunal." *McIlroy v. PaineWebber, Inc.*, 989 F.2d 817, 820 (5th Cir. 1993) (citation omitted).

The Eighth Circuit's foray into fact-finding on the parties' intent runs afoul of the federal policy favoring arbitration. "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is *the construction of the contract language itself* or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (emphasis added). This is so even where the scope of an arbitration clause is ambiguous. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995).

A reviewing court must affirm an arbitration award so long as the arbitrators are even arguably construing or applying the contract and acting within the scope of their authority. *United Paperworkers Intern'l Union, AFL-CIO v.*

Misco, Inc., 484 U.S. 29, 38 (1987). A reviewing court must affirm even if the court is convinced the arbitrators have "committed serious error." *Id.* Thus, where the arbitration clause is broadly written, all doubts should be resolved in favor of arbitration, "'unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute.'" *AT&T Technologies, Inc. v. Communication Workers of America*, 475 U.S. 643, 650 (1986) (citations omitted).

The Eighth Circuit's decision violates these standards by reversing the arbitrators' declaration and supplanting the district court's finding that the award is binding with its own. The arbitration clause in Safety's policies is certainly susceptible to the conclusion that the parties contemplated binding arbitration. As a matter of contract interpretation and procedure affecting the dispute's "final disposition," it was an issue reserved for the arbitrators' exclusive determination. *Green Tree Fin. Corp. v. Bazzle*, __ U.S. __, 123 S. Ct. 2402, 2407 (2003); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002).

Moreover, consistent with the district court's findings of fact, the phrase "finally adjudicated" in the consent order can have only one meaning in the arbitration context. The phrase connotes *binding* arbitration. Even in the Third Circuit, one of the few courts refusing to support the federal policy favoring binding arbitration, the word "final" in an arbitration agreement means *binding* arbitration. *Orlando v. Interstate Container Corp.*, 100 F.3d 296, 301 (3d Cir. 1996).

Instead of deferring to the arbitrators' decision and the district court's findings, the Eighth Circuit engaged in its own fact finding based on gross speculation. The Eighth

Circuit concluded Dow Corning, as an insured, would not have agreed to binding arbitration. Pet. App. 6a. However, there is nothing in the record supporting the Eighth Circuit's finding on what a policyholder would or would not have agreed to.

The Eighth Circuit's concern for policyholders in this case is misplaced. Dow Corning is among the world's most sophisticated corporations. The $9.15 million in coverage provided by Safety's policies made up only a very small part of the over $1 billion in coverage obtained by Dow Corning for its product liability exposure. Appellee's Brief at 5, *Dow Corning Corp. v. Safety Nat'l. Cas. Corp.*, 335 F.3d 742 (8th Cir. 2003). Dow Corning was not a naive policyholder with no negotiating leverage. It knew what it was doing when it agreed to the arbitration clause at issue.

The Eighth Circuit compounded its disregard for the federal policy by placing the burden of proof on Safety to prove the arbitration provision was binding. The Eighth Circuit found "neither party submitted any . . . evidence" of custom and usage to show whether the arbitration was intended to be binding. Pet. App. 6a. Nevertheless, the Eighth Circuit ruled against Safety because Safety "presented no extrinsic evidence that binding arbitration was intended." *Id.*

The Eighth Circuit ignored that Dow Corning was the movant under 9 U.S.C. § 10. Therefore, Dow Corning had the burden of proving that the arbitrators' award should be vacated, not Safety. *Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 111 (2d Cir. 1993). Thus, if the Eighth Circuit believed there was a gap in the evidentiary record on the parties' intent, it should have held that Dow Corning failed to sustain its burden of proof, and affirmed the district court's denial of Dow Corning's motion to vacate.

The Eighth Circuit's decision demonstrates why the Court should declare once and for all that the presumption under the FAA is for binding arbitration. By ignoring the standard of review and the federal policy, by disregarding the consent order which provided for a final adjudication of the parties' dispute by arbitration, and by subjecting Safety to the burden of proof on whether the parties' agreement provided for binding arbitration, the Eighth Circuit has turned the federal policy upside down.

The presumption for arbitration extends to all attendant procedural issues, including those which affect the "final disposition" of the case. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964). Consistent with the arbitrators' decision and the district court's order, the presumption supports the conclusion that binding arbitration was intended. Contrary to the Eighth Circuit's opinion, if the federal presumption were to be rebutted and the decisions of the arbitrators and the district court were to be overturned, the burden of proof rested with Dow Corning, and not Safety. As made plain by the Eighth Circuit's opinion, Dow Corning offered no evidence supporting its position. Pet. App. 6a.

Finally, there was evidence of insurance custom and usage favoring binding arbitration in the record. The evidence of insurance custom and usage was self-proving. In deciding the case, the arbitrators were bound to make their "decision with regard to the custom and usage of the insurance and reinsurance business." Pet. App. 5a. By unanimously finding the arbitration binding, the three arbitrators necessarily followed insurance custom and usage, of which they were experts. The board's members were "active or retired, disinterested officials of insurance or reinsurance companies." Pet. App. 5a. Indeed, the

agreement's incorporation of insurance industry custom and usage to govern the arbitration is indistinguishable from those arbitration agreements that incorporate the rules of the American Arbitration Association, and should be no less dispositive on the binding nature of the arbitration. *Cf. Rainwater v. National Home Ins. Co.*, 944 F.2d 190, 192-93 (4th Cir. 1991) (incorporating American Arbitration Association's rules for entry of judgment on an arbitration award makes the arbitration binding).

The Eighth Circuit should not have substituted its view of the facts for those of the arbitration panel and the district court. The Eighth Circuit addressed the question of the parties' intent *de novo* rather than giving deference to the panel and considering whether the district court's factual findings were clearly erroneous, as required by the Court's decision in *First Options*. The Eighth Circuit's departure from the standard of review and the federal policy favoring binding arbitration "so far depart[s] from the usual course of judicial proceedings" and from settled law that it calls for correction through this Court's power to supervise the actions of the lower federal courts. S. Ct. R. 10(a). Therefore, a writ of certiorari is warranted to review the Eighth Circuit's decision.

CONCLUSION

A writ of certiorari should be granted as the Eighth Circuit's opinion will be precedent which will be seized by all "losers" to disrupt the final and binding resolution of disputes by arbitration, including those between insurers, their insureds, and other insurance companies.

Respectfully submitted,

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